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5 Attorneys for Respondent and Defendant County of San Diego
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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11 PARI ZAHAU; MARY ZAHAU-LOEHNER)
and DOUGLAS LOEHNER,)

12 Petitioners,)
13)

14 v.)

15 SAN DIEGO COUNTY SHERIFF'S)
DEPARTMENT; WILLIAM D. GORE, in his)
16 official capacity as Sheriff of San Diego)
County; and DOES 1 through 20, inclusive,)

17 Respondents.)
18)
19)

Case No.: 37-2020-0024682-CU-MC-CTL
(Petition filed: February 20, 2020)
(FAP filed: July 13, 2021)

**COUNTY OF SAN DIEGO'S REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR PROTECTIVE ORDER**

"IMAGED FILE"

Date: March 25, 2022
Time: 1:30 p.m.
Dept.: 72
Judge: Hon. Timothy B. Taylor

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1 Petitioners appear to concede—as they must—that discovery in California Public Records Act
2 (“CPRA”) cases is only permitted if “necessary to resolve whether the agency has a duty to disclose [the
3 records requested].” *See, City of Los Angeles v. Superior Ct.*, 9 Cal. App. 5th 272, 289 (2017), citing
4 *County of Santa Clara v. Superior Ct.*, 171 Cal. App. 4th 119, 128 (2009). (*Internal quotation omitted.*)
5 Petitioners also do not seriously dispute that the Government Code § 6254(f) investigatory files
6 exemption applies to all of the records requested in their CPRA requests in the first instance.¹

7 Nonetheless, Petitioners contend discovery is necessary to determine whether the Sheriff *waived*
8 the § 6254(f) exemption. Specifically, Petitioners contend the Sheriff’s Department: (i) waived the
9 exemption as to all requested records by stating in 2011 that it was providing Petitioners with the
10 “complete investigative file”; and (ii) waived the exemption as to the Sheriff’s Instructions because the
11 Sheriff discussed the *existence* of the Zahau Investigation publicly. No applicable legal authority
12 supports Petitioners’ novel arguments and they are contrary to established law.

13 The CPRA does not provide for a waiver under either of the circumstances asserted by
14 Petitioners and, as such, no such waiver can occur as a matter of law. *See, e.g., Zumbun Law Firm v.*
15 *Cal. Legislature*, 165 Cal. App. 4th 1603, 1623 (2008). The *only* way that a public agency can waive the
16 § 6254(f) exemption for a given public record is by disclosing the record to a member of the public.
17 *See, Gov’t Code § 6254.5. See also, Rackauckas v. Superior Court*, 104 Cal. App. 4th 169, 178 (2002).

18 There is no exception to these rules for situations where a local police agency tells someone it is
19 releasing the “complete investigative file.” Moreover, Petitioners ignore the Sheriff’s *express*
20 *preservation* of the § 6254(f) exemption in *the very same letter* that Petitioners claim effected an *implied*
21 waiver.

22 And the proposition that a sheriff waives the § 6254(f) exemption as to his or her instructions to
23 an investigator any time he or she discusses the existence of an investigation publicly is without legal
24 support and makes no sense. If that were the rule (and it is *not*), there would quickly *be* no § 6254(f)
25 exemption. Moreover, Petitioners contend that Sheriff Gore did not actually intend to waive the
26 exemption as to the Sheriff’s Instructions, which defeats their argument. *See, e.g., City of Santa Cruz v.*
27 *Pac. Gas & Elec. Co.*, 82 Cal. App. 4th 1167, 1180 (2000) (actual intent is essential to find a waiver).

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¹ Petitioners half-heartedly argue that the Sheriff’s instructions to his investigators (“the Sheriff’s Instructions”) were not exempt in the first instance, but that argument is without merit as explained in Section III of this memorandum, below.

1 I.

2 RELEVANT FACTUAL BACKGROUND

3 A. THE SHERIFF’S 2011 RECORD PRODUCTION AND THE BREMNER LETTER.

4 After the Sheriff’s Department concluded its initial investigation into the 2011 death of Rebecca
5 Zahau (“the Zahau Investigation”), Petitioners’ counsel at the time, Anne Bremner, requested records
6 related to the investigation. In response, the Sheriff produced a considerable number of records. With
7 that production the Sheriff included a letter to Bremner (“the Bremner Letter”) from Robert Faigin, the
8 Sheriff’s Director of Legal Affairs and Chief Legal Advisor (“Faigin”).

9 In the Bremner Letter, Faigin explained that the Sheriff was expressly *not waiving* the § 6254(f)
10 investigatory files exemption, but rather was providing the records under a statutory *exception* to that
11 exemption. *See*, Declaration of Robert P. Fagin (“Faigin Decl.”) ¶ 3 and Exh. A thereto, both attached
12 as Exh. D to the Declaration of Thomas Deák (“Deák Decl.”). The issues raised in Petitioners’
13 opposition papers warrant quoting the Bremner Letter at some length. It provides, in pertinent part:

14 “Law enforcement investigatory records in California are exempt from mandatory
15 disclosure under the California Public Records Act, the state’s open record law.
16 [Citation.] Moreover, this exemption from disclosure does not expire with the
17 termination of the investigation.

18 Nevertheless, the Public Records Act requires that certain limited information about
19 every law enforcement call for service and/or arrest be made available to the public.
20 Additionally the PRA requires that additional information be made available to ‘victims
21 of an incident’; information that is not otherwise required to be made available to the
22 public.

23 *It is pursuant to this ‘victims of an incident’ exception that the Sheriff’s Department is*
24 *making its file available to you. We do not believe that anyone outside of the immediate*
25 *Zahau family would have a legal basis to demand the same information that is being*
26 *provided to you. The Sheriff’s Department is complying with this requirement not merely*
27 *by releasing the information required by statute, but by releasing the complete*
28 *investigative file.*

29 Asserting the exemption and keeping the investigation confidential is SDSO policy in all
30 investigations, unless there is a compelling law enforcement reason otherwise. As things
31 stand presently, we see no reason to deviate from our normal practice. *Therefore, it is*
32 *our intention to continue to assert the exemption for law enforcement investigations*
33 *against any and all requests by members of the public and the media for release of the*
34 *Rebecca Zahau investigation.” See*, Exh. A to Faigin Decl. (*Emphasis added.*)

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1 where the agency has disclosed a document ‘to any member of the public.’” [Citing Gov’t Code §
2 6254.5.] [*Emphasis added.*]; *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 773 (1983)
3 (“A waiver of an exemption exists under section 6254.5 ‘whenever a state or local agency discloses a
4 public record which is otherwise exempt”).

5 Petitioners thus ask this Court to create a *new* CPRA exemption waiver, but there is no legal
6 basis for doing so. The Legislature knew how to create a CPRA waiver provision when it intended to.
7 *See*, Gov’t Code § 6254.5. Petitioners provide no authority showing the Legislature intended to create a
8 waiver to the CPRA’s broad “records of investigations” exemption whenever a local policy agency says
9 it is producing the complete investigative file or discusses an investigation publicly. As such, no such
10 waiver can occur as a matter of law. *Zumbrun, supra*, is instructive.

11 In *Zumbrun*, the plaintiff requested records from the California Legislature pursuant to the
12 Legislative Open Records Act, Gov’t Code § 9070, et seq. (“LORA”) and the Legislature disclosed
13 some records but withheld others based on exemptions set forth in the LORA statutes. *Zumbrun, supra*,
14 165 Cal. App. 4th at 1610-1611. The plaintiff in *Zumbrun* argued that the Legislature had waived the
15 LORA disclosure exemptions by “disclosure of some documents.” *Id.* at 1623. The court rejected this
16 argument, reasoning:

17 “[W]e conclude that the [LORA] statutory exemptions from disclosure are not the
18 equivalent of evidentiary privileges, which may be waived by disclosure. Privilege, as
19 defined by the Evidence Code, relates to proceedings in which testimony may be
20 compelled by law to be given. (Evid. Code, § 901.) Plaintiff cites no authority to support
21 its claim that an exemption to LORA’s open records policy is to be treated as if it were
22 an evidentiary privilege subject to waiver if disclosed, and we are aware of no such
23 authority.¶¶ LORA contains its own enforcement mechanism. A person may institute
24 proceedings to enforce the right to inspect legislative records, and may obtain a contempt
25 order if such records are not disclosed pursuant to court order. (§§ 9076, 9077.) *LORA*
26 *does not provide for waiver of exemptions*. We will not engraft penalties onto the
27 legislative scheme that the statutes cannot fairly be read to contain.” *Id.* (*Emphasis*
28 *added.*)

24 *Zumbrun* thus stands for the proposition that, if an open records law does not provide a basis for waiver
25 of statutory exemptions, no such waiver can occur as a matter of law.

26 Like the LORA, the CPRA contains its own enforcement mechanism. *See*, Gov’t Code § 6258.
27 Gov’t Code § 6254.5 provides that a waiver of the CPRA investigatory files exemption occurs when a
28 public agency has disclosed an exempt “public record,” but it does *not* provide that a waiver occurs as to

1 all exempt files when an agency says it is disclosing the complete investigative file or discusses the
2 investigation publicly. This court should not engraft penalties onto the CPRA legislative scheme that
3 the statutes cannot fairly be read to contain.

4 The authorities Petitioners cite for their waiver argument have nothing to do with the CPRA and
5 are inapposite. In *In re Marriage of Paboojian*, 189 Cal. App. 3d 1434 (1987),² the court held that a
6 wife had waived her court-ordered right to spousal support because she expressly waived the right
7 during a call with her ex-husband and did not demand spousal support for 16 years thereafter. *Id.* at
8 1437-39. In *Rubin v. Los Angeles Fed. Sav. & Loan Assn.*, 159 Cal. App. 3d 292 (1984), the court held
9 that a bank waived its contractual right to foreclosure in the event the property was sold by continuing to
10 accept the new owner's loan payments after having full knowledge of the sale. *Id.* at 296.

11 Neither *Paboojian* nor *Rubin* governs here. First and foremost, neither case involved a statute
12 that both created the right at issue and defined the terms under which it could be waived. Here, in
13 contrast, the CPRA both created the exemption right (*see*, § 6254(f)) and defined the terms under which
14 it could be waived (*see*, § 6254.4). The CPRA does not provide for a waiver of the § 6254(f) exemption
15 under the circumstances asserted by Petitioners, so no such waiver can occur as a matter of law. *See*,
16 *e.g.*, *Zumbrun, supra*, 165 Cal. App. 4th at 1623.

17 In addition, both *Paboojian* and *Ruben* are factually distinguishable. *Paboojian* involved an
18 *express waiver* and both cases turned on *conduct* inconsistent with an intention to enforce the right.
19 Here, there was *no express waiver* (rather, the Sheriff expressly *preserved* its exemption right) and *no*
20 *conduct* inconsistent with an intention to enforce the right (the Sheriff never disclosed *any* records
21 except pursuant to the “victims of an incident” exception and consistently expressly asserted the §
22 6254(f) exemption in response to all of Petitioners’ CPRA requests). Petitioners have thus provided no
23 applicable legal authority supporting their waiver argument.

24 **B. THE SHERIFF EXPRESSLY PRESERVED THE INVESTIGATORY**
25 **FILES EXEMPTION IN THE BREMNER LETTER.**

26 Seeking to manufacture a factual dispute to justify their depositions, Petitioners argue that the
27 Sheriff's statement in the Bremner Letter that it was providing the “complete investigative file” “is
28 clearly sufficient to create a question of fact as the Sheriff's ‘actual intention to relinquish’ the

1 exemption, or alternatively, to constitute ‘conduct so inconsistent with any intent to enforce the right’ as
2 to induce a reasonable belief that it has been relinquished.” Oppo. 5:13-22. Petitioners are mistaken.

3 Faigin, the author of the Bremner Letter, has declared, under oath:

4 “At no time during the drafting and sending of the Bremner Letter and the release of the
5 “investigative file” referenced therein was it my intention or the intention of the Sheriff to
6 waive the benefit of any exemption to the disclosure of public records set forth in the
7 California Public Records Act (“CPRA”), including, but not limited to, the exemption for
8 records of law enforcement investigations under Government Code § 6254(f) (hereafter,
9 “§ 6254(f)”.)” See, Faigin Decl. ¶ 3.

10 Faigin further clarified that when he used the term “investigative file” in the Bremner Letter, he
11 did not intend the term to mean every record in the Sheriff’s possession that related to the Zahau
12 Investigation. *Id.* at ¶ 4. It is merely Petitioners’ unsupported bare assumption that Faigin meant to
13 equate the term “investigative file” with the scope of the § 6254(f) exemption. It is clear from Faigin’s
14 declaration that he did not.

15 Petitioners offer *no evidence* that counters Faigin’s sworn statement. Petitioners cite the
16 Bremner Letter itself, apparently contending that it constitutes “conduct inconsistent with an intent” to
17 assert the § 6254(f) exemption. However, as Faigin expressly explained—in *the Bremner Letter*—the
18 Sheriff was *preserving* the § 6254(f) exemption and was specifically producing the records under a
19 statutory *exception* to that exemption. See, Faigin Decl. ¶ 3 and Exh. A thereto.³

20 As such, there is *nothing* in the Bremner Letter that is inconsistent with the Sheriff’s stated
21 intention to assert the § 6254(f) exemption and, as such, there can be no implied waiver by conduct.
22 Indeed, Petitioners cannot even make this argument without badly misconstruing the Bremner Letter and
23 quoting it out of context. See, e.g., Oppo. 5:13-17 (quoting the Bremner Letter, but omitting the
24 statement that the Sheriff was acting under an exception to the § 6254(f) exemption). Because
25 Petitioners have provided no evidence to counter the County’s evidence, there is no factual dispute that
26 warrants discovery. The discovery Petitioners seek here is clearly “sought for the bare hope of falling
27 upon something that might impugn” the County’s evidence and therefore “improper.” See, *City of Los*
28 *Angeles, supra*, 9 Cal. App. 5th at 290. (*Internal quotation marks omitted.*)

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² Superseded by statute as explained in *In re Marriage of Hamer*, 81 Cal. App. 712, 721-22 (2000).

³ Please see the relevant language from the Bremner Letter set forth in Section I of this memorandum, above.

1 Petitioners’ tortured explanation of how “discovery ... is now necessary to determine whether
2 the documents Petitioners request exist, and how they are classified by Respondents” (*see*, Oppo. 6:23-
3 25) reveals the crucial flaw in their argument. The material issue in this case is not whether the
4 requested records exist or how they were classified; it is whether the Sheriff properly withheld them as
5 exempt. *See, City of Los Angeles, supra*, 9 Cal. App. 5th at 289. Once one accepts that the requested
6 records are exempt (and they are), the *only* potential factual issue Petitioners have identified relevant to
7 the exemption issue is waiver. It is therefore the *waiver* issue for which Petitioners *must* offer relevant
8 evidence to avoid a protective order, but Petitioners have offered no such evidence.

9 C. **THE SHERIFF DID NOT WAIVE THE INVESTIGATORY FILES EXEMPTION AS TO THE**
10 **SHERIFF’S INSTRUCTIONS BY DISCUSSING THE EXISTENCE OF THE ZAHAU**
11 **INVESTIGATION PUBLICLY.**

12 Petitioners’ contention that the Sheriff’s public discussion of the 2018 reassessment of the Zahau
13 Investigation shows a waiver is without merit. Petitioners provide no applicable legal authority in
14 support of the argument and it should be disregarded on that basis, alone. *See, People v. Stanley*, 10 Cal.
15 4th 764, 793 (1995). Nonetheless, it is established law in California that a local police agency may
16 disclose information *from* an exempt investigatory file while maintaining the exemption as to the record
17 itself. *See, e.g., Williams, supra*, 5 Cal. 4th at 353 (“The Legislature ... adopted a series of amendments
18 [to the CPRA] that required the disclosure of *information derived from the records* while, in most cases,
19 preserving the exemption for the records themselves.” [*Emphasis in original.*]).

20 However, Petitioners’ argument also fails because it cannot be squared with their contention that
21 the Sheriff, in fact, never *actually intended* to disclose the Sheriff’s Instructions. Petitioners contend the
22 Sheriff’s representations about the reassessment of the Zahau Investigation were “a lie [that] was part of
23 a cleverly orchestrated deception,” as Sheriff Gore never actually intended to publicly disclose his
24 instructions to his investigators. *See*, Oppo. 2:23-25; 8:1-5. *See also*, FAP ¶ 20.

25 The County obviously disputes these inflammatory allegations. However, it is clear that
26 Petitioners—by those allegations—contend the Sheriff never actually intended to waive any exemption
27 and disclose the Sheriff’s Instructions to the public (i.e., if the Sheriff’s actual intention was to deceive
28 the public about the scope of the Zahau Investigation, then he cannot have logically actually intended to
disclose records that would *reveal* the deception).

1 “[F]or waiver to be effective, there must be an *actual intention* to relinquish the right based on
2 knowledge of the underlying facts. [Citations.] Although waiver need not be express, an implied
3 waiver must nonetheless be based on conduct indicating an intention to relinquish the right.” *City of*
4 *Santa Cruz, supra*, 82 Cal. App. 4th at 1180. (*Emphasis added.*) *See also, Waller v. Truck Ins. Exch.,*
5 *Inc.*, 11 Cal. 4th 1, 31 (1995) (“Waiver always rests upon intent.” [Quoting *DRG/Beverly Hills, Ltd. v.*
6 *Chopstix Dim Sum Café & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 60 (1994).] [*Internal quotation*
7 *omitted.*])

8 Thus, while a waiver may be implied from conduct, such conduct is only relevant to the extent it
9 shows an *actual intention* to relinquish the right (i.e., the key issue is what the conduct reveals about a
10 person’s actual intention, not how the conduct may have been perceived by others). *See, e.g.,*
11 *DRG/Beverly Hills, Ltd., supra*, 30 Cal. App. 4th 54, 60 (1994) (“The pivotal issue in a claim
12 of waiver is the intention of the party who allegedly relinquished the known legal right.”). When the
13 party asserting waiver insists there *was* no actual intention to relinquish the right, however, the alleged
14 conduct becomes irrelevant—the crucial question of whether there was an actual intention to waive has
15 been answered, and in the negative.

16 Lastly, Petitioners argue—again without citation to any relevant legal authority—that the Sheriff
17 waived the § 6254(f) exemption for the Sheriff’s Instructions by “publishing” those instructions
18 publicly. *See, Oppo.* 3:18. What Petitioners mean by this is not entirely clear, but they do not provide
19 *any* evidence showing the Sheriff ever “published” the Sheriff’s Instructions. At best, Petitioners point
20 to public statements to the effect that a reassessment *was conducted*. *See, Oppo.* 6:26 to 7:3. But that
21 public statement says nothing about the content of the Sheriff’s Instructions. *Id.*

22 **D. THE COUNTY IS NOT USING THE INVESTIGATORY FILES EXEMPTION AS A “SWORD”**
23 **BECAUSE IT HAS NOT PLACED THE ZAHAU INVESTIGATION FILES IN ISSUE.**

24 Petitioners’ “sword and shield” implied waiver argument (*see, Oppo.* 8:11-20)—which pertains
25 to waiver of *evidentiary privileges*, not CPRA exemptions—fails because it requires that the party
26 asserting the privilege must have placed privileged evidence “in issue” in a case while simultaneously
27 asserting the privilege as a basis to withhold the same evidence from opponents. *See, Rockwell Internat.*
28 *Corp. v. Superior Court*, 26 Cal. App. 4th 1255, 1268 (1994); *People v. Daniels*, 52 Cal.3d 815, 858

1 n.14 (1991); *Mitchell v. Superior Court*, 37 Cal.3d 591, 604 (1984). The doctrine does not apply here,
2 however, because the County has never placed the Zahau Investigation files in issue in this case.

3 **III.**

4 **THE SHERIFF'S INSTRUCTIONS ARE EXEMPT RECORDS**
5 **OF A LAW ENFORCEMENT INVESTIGATION**

6 The Sheriff's Instructions served *no other purpose* but to direct the Sheriff's investigators how to
7 conduct the Zahau Investigation. *See*, FAP ¶ 45. As such, the Sheriff's Instructions are exempt on their
8 own terms as records that "actually relate" to the Zahau Investigation. *See, Williams v. Superior Court*
9 *(Freedom Newspapers, Inc.)*, 5 Cal. 4th 337, 356 (1993). Petitioners offer no legal authority to warrant
10 a different conclusion.

11 Petitioners argue that the Sheriff's Instructions do not come under the § 6254(f) exemption
12 because "they do not constitute 'that portion of those investigative files that reflects the analysis or
13 conclusions of the investigating officer.'" *See*, Oppo. 6:11-14. Petitioners both misconstrue and
14 misapply § 6254(f).

15 Petitioners misconstrue § 6254(f) because the "analysis and conclusions of the investigating
16 officer" language upon which they rely does not define the exemption. The "broad" investigatory files
17 exemption applies to "[r]ecords of ... investigations conducted by ... any ... local police agency." *See*,
18 Gov't Code § 6254(f); *Williams, supra*, 5 Cal. 4th at 349. The statute then sets forth an *exception* to that
19 general exemption, requiring that, "[h]owever, state and local law enforcement agencies shall disclose"
20 certain specified information about the investigation (e.g., names of persons involved, witnesses, etc.).
21 *See*, Gov't Code § 6254(f). *See also, City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1424
22 (1995) (noting that subdivisions of § 6254(f) that "require the disclosure of specified information" are
23 "an exception to a general exemption for law enforcement files").

24 The statute then sets forth an *exception to the exception*, stating: "[H]owever, this subdivision
25 does not require the disclosure of that portion of those investigative files that reflects the analysis or
26 conclusions of the investigating officer." *Id.* Petitioners would have the Court focus on the narrow and
27 inapplicable exception to the exception to the broad exemption, rather than on the applicable broad
28 exemption itself. Petitioners' reading of the statute does not bear scrutiny.

1 It must be noted that, if Petitioners were correct, untold categories of *evidence* collected as part
2 of a law enforcement investigation would be subject to disclosure (i.e., because it does not reflect the
3 officers' analysis or conclusions). That is clearly not the case. *See, e.g., Haynie v. Superior Court*, 26
4 Cal. 4th 1061, 1071-72 (2001) (holding that a "tape recording of the citizen report," received before any
5 investigation had even commenced, was subject to the § 6254(f) exemption).

6 Even if Petitioners' interpretation of § 6254(f) were correct, however (and it is *not*), they
7 misapply the statute. The Sheriff's Instructions allegedly directed the Sheriff's investigators *how* to
8 reassess the Zahau Investigation (*see, e.g., FAP ¶ 34*), so they would undoubtedly reflect the analysis of
9 the investigating officers.

10 IV.

11 SHERIFF GORE IS AN APEX DEPONENT

12 Petitioners contend that Sheriff Gore is not an "apex deponent" because he has personal
13 knowledge of the Sheriff Instructions. *See, Oppo. 9:8-18*. Petitioners are mistaken. "The sole purpose
14 of [a CPRA] action is to permit the expeditious determination of the obligation to disclose records
15 requested from a public agency," [so] discovery is *only* permitted if "necessary to resolve whether the
16 agency has a duty to disclose" *See, City of Los Angeles, supra*, 9 Cal. App. 5th at 289.

17 Petitioners argue that Sheriff Gore has personal knowledge about what was in the Sheriff's
18 Instructions and whether they were followed, but these are not material issues here. The only material
19 issue is whether the County had a duty to disclose the Sheriff's Instructions and the County provided
20 Sheriff Gore's sworn statement that he had no involvement whatsoever in the Sheriff's review or
21 analysis of Petitioners' 2020 CPRA Requests or the decision to reject them. *See, Gore Decl. ¶ 3*.

22 CONCLUSION

23 Petitioners have provided no evidence to counter the County's evidence showing the Sheriff
24 properly withheld the requested records and no evidence showing the Sheriff waived the § 6254(f)
25 exemption. As such, the County is entitled to the requested protective order.

26 DATED: March 18, 2022

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